

STATE OF MICHIGAN
COURT OF APPEALS

JOSE A. RODRIGUEZ,

Plaintiff-Appellant,

v

FEDEX FREIGHT EAST, INC., RODNEY
ADKINSON, LAURA BRODEUR, MATTHEW
DISBROW, WILLIAM D. SARGENT, and
HONIGMAN MILLER SCHWARTZ and COHN,
LLP,

Defendants-Appellees.

UNPUBLISHED

March 25, 2014

No. 312187

Wayne Circuit Court

LC No. 09-028366-NO

Before: M. J. KELLY, P.J., and CAVANAGH and FORT HOOD, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting defendants' motion for summary disposition on the grounds of res judicata and collateral estoppel. We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

On July 30, 2003, plaintiff resigned from his employment as a truck driver for FedEx Freight East, Inc. (FedEx), allegedly because of discriminatory treatment based on his national origin. In December 2003, plaintiff filed his first amended complaint against FedEx in the Wayne Circuit Court alleging claims of constructive discharge, retaliation, hostile work environment, and failure to promote in violation of the Elliott Larsen Civil Rights Act. Shortly thereafter, the lawsuit was removed to the federal district court. In March 2004, plaintiff filed for bankruptcy and the lawsuit became an asset of the bankruptcy estate.

In October 2004, FedEx filed a motion for summary judgment which was supported by a purported affidavit of its regional human resource manager, Rodney Adkinson. The affidavit was not notarized. The federal district court referred the motion to the bankruptcy court for adjudication. At the hearing conducted in August 2005, plaintiff's counsel objected to the court's consideration of Adkinson's "affidavit" in deciding the motion. FedEx's attorney, Laura

Brodeur,¹ advised the court that the affidavit was notarized contemporaneously with the filing of the motion, and she offered to submit the notarized affidavit to the court as well as to plaintiff's counsel. The bankruptcy judge indicated that he would accept her representation, and directed her to forward a copy of the notarized affidavit to plaintiff's counsel. The court then proceeded with the hearing on FedEx's motion and, at its conclusion, indicated that the matter would be taken under advisement. Subsequently, plaintiff's counsel received the purportedly notarized affidavit in the mail and did not proceed further with his objection to the affidavit. In December 2005, the bankruptcy court rendered its opinion, granting FedEx's motion for summary judgment on all of plaintiff's claims. The order was affirmed by the federal district court. Plaintiff then filed an appeal in the Sixth Circuit Court of Appeals and, in June 2007, the dismissal was affirmed with regard to all of plaintiff's claims except the failure to promote claim which was remanded to the district court for further proceedings. *In re Rodriguez*, 487 F3d 1001, 1012 (CA 6, 2007).

In June 2008, a five-day jury trial was conducted in the federal district court on plaintiff's failure to promote claim. During the trial, plaintiff's counsel cross-examined Adkinson about his affidavit and its averments. The jury eventually returned a verdict in favor of FedEx, answering "no" to the question whether FedEx failed to promote plaintiff to a supervisor position because of his national origin. Thereafter, plaintiff filed a motion for JNOV, mistrial, new trial, and to strike certain trial testimony. The district court denied plaintiff's motion and entered judgment in favor of FedEx. Plaintiff filed an appeal in the Sixth Circuit Court of Appeals and the judgment was affirmed. *In re Rodriguez*, 403 Fed Appx 55, 57 (CA 6, 2010).

In November 2009, plaintiff filed this lawsuit in the Wayne Circuit Court against FedEx, Adkinson, FedEx's attorneys, Brodeur, Matthew Disbrow, William Sargent, and their law firm, Honigman Miller Schwarz and Cohn, LLP, alleging that defendants deceived and defrauded plaintiff, his counsel, and the federal courts with regard to his 2003 employment discrimination lawsuit against FedEx. In count I, plaintiff asserted an abuse of process claim and alleged that FedEx's attorney "Brodeur knowingly stated falsely: (1) that Adkinson had notarized an affidavit 'contemporaneous' with the filing of FedEx's motion, (2) that she had intended to bring the notarized Affidavit to Court and (3) that she would file the 'notarized' Affidavit with the Court and provide a copy to Plaintiff's counsel." Plaintiff alleged that Brodeur never filed a notarized affidavit with the court; however, the bankruptcy court, the federal district court, and the Sixth Circuit Court of Appeals improperly relied on the averments set forth in Adkinson's unsworn affidavit. Further, plaintiff alleged, at trial Adkinson admitted that the "affidavit" contained several false and misleading material assertions, particularly related to the alleged reasons plaintiff was not promoted to a supervisor position; thus, FedEx's attorneys knowingly filed a false, unsworn "affidavit" for the purpose of deceiving and defrauding plaintiff and all three federal courts, thereby depriving plaintiff of his right to the fair adjudication of his claims. In count II of his complaint, plaintiff asserted "common law fraud, fraudulent misrepresentation,

¹ Attorney Brodeur was employed by the law firm of Honigman Miller Schwartz and Cohn LLP, and represented FedEx in the federal lawsuit with attorneys William Sargent and Matthew Disbrow.

inducement, concealment and deceit” claims premised on the same or similar allegations. Plaintiff alleged that, as a consequence of defendants’ actions, he was denied the right to have his constructive discharge, retaliation, and hostile work environment claims fully considered and fairly decided before they were dismissed.

In response to plaintiff’s state law complaint, defendants filed a notice of removal and plaintiff’s case was removed to the federal district court.

In December 2009, plaintiff also filed a complaint in federal district court asserting a claim of “fraud on the courts” with regard to his 2003 employment discrimination lawsuit. Relying on Federal Rules of Civil Procedure (FRCP) 60(b), plaintiff requested the district court to vacate the order granting summary judgment of his constructive discharge, retaliation, and hostile work environment claims because of defendants’ alleged fraudulent actions. In response to plaintiff’s federal complaint, defendants filed a motion to dismiss under FRCP 12(b)(6) [failure to state a claim] or, in the alternative, under FRCP 56(c) [summary judgment].

On February 10, 2010, the district court issued a decision granting defendants’ motion to dismiss pursuant to FRCP 12(b)(6). The federal district court held that even accepting plaintiff’s factual allegations as true, the allegations did not “plausibly suggest acts of extrinsic fraud necessary to support a finding of fraud on the courts.” The court explained that an independent action to obtain relief from judgment is only available for extrinsic fraud, i.e., conduct which deprives a party from the opportunity to present his claims in court. And “[m]atters within the knowledge of a party seeking relief from judgment on the basis of fraud on the court do not deprive that party of the opportunity to present their claims in court.” Further, the court noted, even perjury is insufficient to establish fraud on the court; thus, the submission of a false affidavit was also insufficient to establish a claim of extrinsic fraud warranting relief from judgment. In this case, the nature of Adkinson’s affidavit, i.e., that it was “unsworn” and “un-notarized,” was within plaintiff’s counsel’s knowledge and, therefore, plaintiff was not deprived of the opportunity to raise this issue in the three federal courts presiding over that lawsuit. The district court also held that plaintiff’s allegations regarding Adkinson’s false, material affidavit statements were conclusory and unavailing; thus, the allegations “do not support a plausible finding of a grave miscarriage of justice or of egregious conduct involving the corruption of the judicial process” sufficient to state a fraud on the court claim. Accordingly, the court granted defendants’ motion and dismissed plaintiff’s 2009 federal fraud on the court complaint.

In April 2010, the federal court granted plaintiff’s motion to remand his state law abuse of process and fraud claims to the Wayne Circuit Court. The federal court held that the claims arose under state law, not federal law, and that defendants failed to demonstrate that the district court had original federal question jurisdiction under 28 USC § 1331 based on a substantial question of federal law. Accordingly, the matter was remanded to the Wayne Circuit Court.

On April 16, 2010, after remand to Wayne Circuit Court, defendants filed a motion for summary disposition.

On April 23, 2010, plaintiff filed an amended complaint. In count I, plaintiff alleged a malicious abuse of process claim premised on defendants’ use of the un-notarized, materially false Adkinson affidavit in the 2003 federal employment litigation for the purpose of deceiving

and defrauding plaintiff, his counsel, and the federal courts causing plaintiff to suffer damages. In count II, plaintiff alleged “common law fraud, fraudulent misrepresentation, inducement, concealment and deceit” claims premised on defendants’ misrepresentations regarding, and use of, the un-notarized, materially false Adkinson affidavit in the 2003 federal employment litigation which deceived and defrauded plaintiff, his counsel, and the federal courts causing plaintiff to suffer damages.

In June 2010, the Wayne Circuit Court entered an order staying the state law action pending resolution of plaintiff’s federal appeal.

On March 5, 2012, the Sixth Circuit Court of Appeals affirmed the district court’s dismissal of plaintiff’s 2009 federal fraud on the court case, holding that plaintiff “has not alleged sufficient facts to render his claim plausible as opposed to merely possible.” *Rodriguez v Honigman Miller Schwartz & Cohn LLP*, 465 Fed Appx 504, 508 (CA 6, 2012). Further, the court held, even if plaintiff’s allegations were accepted as true, the five elements of a fraud on the court claim could not be established. *Id.* at 509. In particular, plaintiff could not establish that the courts were deceived by defendants’ alleged conduct and that such conduct actually subverted the administration of justice. *Id.*

On April 10, 2012, defendants filed in the Wayne Circuit Court a motion for summary disposition pursuant to MCR 2.116(C)(5), (7), and (8), arguing that plaintiff’s state law claims were barred by res judicata and collateral estoppel as a consequence of the 2009 federal fraud on the court action and the 2003 federal employment litigation.

Plaintiff opposed the motion arguing, in summary, that neither res judicata nor collateral estoppel barred his state law abuse of process and fraud claims which arose from conduct perpetrated against plaintiff and his attorney by defendants. In particular, plaintiff and his attorney were falsely and fraudulently led to believe by defendants that: (1) Adkinson’s affidavit was provided to the federal court in support of defendants’ motion for summary judgment, (2) the affidavit was properly signed, sworn, and notarized, and (3) the affidavit contained truthful statements of fact. Consequently, plaintiff’s objections to the affidavit were abandoned and three of his claims were dismissed by the federal court in the 2003 federal employment litigation. The only issue in the 2003 federal employment litigation was whether plaintiff was subjected to discrimination during the course of his employment. The only issue in the 2009 federal fraud on the court case was whether the federal court was deceived by defendants’ actions during the employment litigation, not whether plaintiff and his counsel were deceived by defendants’ actions. Therefore, defendants were not entitled to summary disposition of plaintiff’s claims under the doctrines of res judicata and collateral estoppel.

On July 20, 2012, following oral arguments on defendants’ motion for summary disposition, the trial court agreed with defendants’ arguments that collateral estoppel and res judicata barred plaintiff’s state law claims; thus, defendants’ motion was granted. On August 14, 2012, plaintiff’s motion for reconsideration was denied and this appeal followed.

Plaintiff first argues that the trial court committed reversible error when it concluded that the federal court’s dismissal of plaintiff’s fraud on the court action had a res judicata effect on

his state law abuse of process and fraud claims, which were remanded to the state court without adjudication on the merits. We agree.

This Court reviews de novo a trial court's decision on a motion for summary disposition. Summary disposition is proper under MCR 2.116(C)(7) where a claim is barred by res judicata or collateral estoppel. *Stoudemire v Stoudemire*, 248 Mich App 325, 332; 639 NW2d 274 (2001); *Alcona Co v Wolverine Environmental Prod, Inc*, 233 Mich App 238, 246; 590 NW2d 586 (1998). The application of res judicata or collateral estoppel presents a question of law reviewed de novo on appeal. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008). In reviewing the trial court's ruling pursuant to subrule (C)(7), this Court "consider[s] all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them." *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001).

In *Adair v Michigan*, 470 Mich 105; 680 NW2d 386 (2004), our Supreme Court explained:

The doctrine of res judicata is employed to prevent multiple suits litigating the same cause of action. The doctrine bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first. [*Id.* at 121.]

The burden of establishing the applicability of res judicata is on the party asserting it. *Baraga Co v State Tax Comm*, 466 Mich 264, 269; 645 NW2d 13 (2002).

In this case, plaintiff filed his state law action in Wayne Circuit Court in November 2009. Plaintiff then filed his federal fraud on the court action in December 2009. Thus, clearly, the state law action was not a "second, subsequent action" for purposes of res judicata. See *Adair*, 470 Mich at 121. The state law action was filed before the federal action, but litigation was delayed because defendants improperly removed the case to federal court. Eventually, the federal district court held that it lacked jurisdiction over plaintiff's state law claims and remanded the case to the Wayne Circuit Court for adjudication. Further, even if plaintiff had included his state law claims in the federal fraud on the court action, when the federal court summarily dismissed the single federal claim, it "clearly would have dismissed the state claims" because no exceptional circumstances existed that would have given the federal court "cause to retain supplemental jurisdiction." *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 384; 596 NW2d 153 (1999). Therefore, res judicata was not applicable to plaintiff's state law action. Accordingly, the trial court's decision holding that plaintiff's state law action was barred by res judicata as a consequence of the decision rendered in the later-filed federal action is reversed.

Next, plaintiff argues that his state action was not barred by res judicata as a consequence of the 2003 federal employment litigation against FedEx. We agree. Although plaintiff's state law action was a "second, subsequent action" to the 2003 federal employment action, that federal case was filed against FedEx, only, and the sole issue decided by the jury was whether plaintiff proved his failure to promote discrimination claim against FedEx. Thus, the 2003 federal

employment litigation and the 2009 state law action do not involve the “same parties or their privies.” See *Adair*, 470 Mich at 121. “To be in privity is to be so identified in interest with another party that the first litigant represents the same legal right that the later litigant is trying to assert.” *Id.* at 122.

Further, the claims raised in the 2009 state law action were not, and could not have been, resolved in the 2003 federal employment litigation. See *id.* at 121. Res judicata “bars not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not.” *Id.* In the 2003 federal employment litigation, the “transaction” at issue was FedEx’s alleged discrimination against plaintiff during the course of his employment. In the state law action, the “transaction” at issue was not conduct that occurred during the course of plaintiff’s employment at FedEx; rather, it was FedEx’s attorneys’ alleged conduct during the course of the litigation of plaintiff’s employment claims. Thus, the “transactional test” is clearly not met, i.e., a single group of operative facts did not give rise to plaintiff’s theories of relief. See *id.* at 124, quoting *River Park, Inc v Highland Park*, 184 Ill 2d 290, 307-309; 703 NE2d 883 (1998). Accordingly, the trial court’s decision holding that plaintiff’s state law action was barred by res judicata as a consequence of the 2003 federal employment litigation against FedEx is reversed.

Finally, plaintiff argues that the trial court committed reversible error when it concluded that the federal court actions had a collateral estoppel effect on his state law abuse of process and fraud claims because the ultimate issues in the state law action were not identical to the ultimate issues determined in either of the federal cases. We agree, in part.

“Collateral estoppel, or issue preclusion, precludes relitigation of an issue in a subsequent, different cause of action between the same parties or their privies when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in the prior proceeding.” *Ditmore v Michalik*, 244 Mich App 569, 577; 625 NW2d 462 (2001). It is clear that plaintiff’s 2003 federal employment litigation did not preclude plaintiff’s 2009 state law claims. The issue in the 2003 federal litigation was whether FedEx failed to promote plaintiff because of his national origin.

Further, the litigation of plaintiff’s federal fraud on the court claim did not entirely preclude plaintiff’s state law claims. “For collateral estoppel to apply, the ultimate issue to be concluded in the second action must be the same as that involved in the first. The issues must be identical, and not merely similar.” *Eaton Co Bd of Co Rd Comm’rs v Schultz*, 205 Mich App 371, 376; 521 NW2d 847 (1994). The issue in the federal fraud on the court case was whether the order summarily dismissing plaintiff’s 2003 claims of constructive discharge, retaliation, and hostile work environment should be vacated pursuant to FRCP 60(b)(3) because the federal courts were deceived by the Adkinson affidavit. The action sought equitable relief against a judgment allegedly procured by “after-discovered fraud.” See *Hazel-Atlas Glass Co v Hartford-Empire Co*, 322 US 238, 244-245; 64 S Ct 997; 88 L Ed 1250 (1944), overruled on other grounds *Standard Oil Co v United States*, 429 US 17, 18 n 2; 97 S Ct 31; 50 L Ed 2d 21 (1976). However, the case was dismissed on the ground that plaintiff failed to state a claim of fraud on the court and that decision was affirmed by the Sixth Circuit Court of Appeals.

The issue in plaintiff's state law abuse of process and fraud action, however, was whether plaintiff and his counsel were deceived by defendants' actions in the 2003 federal employment litigation causing plaintiff to suffer damages. In particular, plaintiff alleged that he and his counsel were deceived by FedEx's attorneys' representations to the bankruptcy court that a properly signed and notarized affidavit containing sworn averments would be provided to plaintiff's counsel and filed with that court before FedEx's motion for summary judgment was decided. In reliance on that representation, as well as the material factual averments contained within the Adkinson affidavit, plaintiff abandoned his objections to the Adkinson affidavit and ultimately three of his claims were dismissed in the 2003 employment litigation. However, as plaintiff argued in the trial court, (1) a properly notarized affidavit was not provided to the bankruptcy court contrary to defendants' representations to plaintiff, including in a letter dated August 29, 2005, (2) plaintiff's expert concluded that it appeared the allegedly notarized affidavit later provided to plaintiff's counsel could have been forged, and (3) the factual averments contained within the Adkinson affidavit were later determined to be materially false and grossly misleading. Thus, the issue whether plaintiff and his counsel were deceived by defendants' alleged abuse of process and fraudulent actions in the 2003 federal employment litigation, causing plaintiff to suffer damages, was never considered or decided in the 2009 federal fraud on the court action. The questions of fact presented in the state law action were not essential to the federal judgment and were not actually litigated or determined by the federal court's dismissal of plaintiff's fraud on the court action; thus, collateral estoppel is not applicable. See *VanVorous v Burmeister*, 262 Mich App 467, 480; 687 NW2d 132 (2004) (citation omitted). However, plaintiff is collaterally estopped from asserting in his state law action that defendants' actions in the 2003 federal employment litigation constituted fraud on the federal courts. That issue was actually and necessarily decided in the federal proceeding which culminated in a valid final judgment. See *Ditmore*, 244 Mich App at 577. Accordingly, we affirm the Wayne Circuit Court's order to the extent it bars plaintiff from relitigating the fraud on the court issue in the state law action, but we reverse that court's order dismissing plaintiff's abuse of process and fraud-based claims against defendants on the grounds that res judicata and collateral estoppel barred these claims.

Affirmed in part, reversed in part, and remanded to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Kelly
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood